37194
EB

SERVICE DATE – AUGUST 11, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 254X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE EXEMPTION—IN STANLY COUNTY, NC

STB Docket No. AB-290 (Sub-No. 274X)

YADKIN RAILROAD COMPANY—DISCONTINUANCE OF SERVICE EXEMPTION—IN STANLY COUNTY, NC

STB Docket No. AB-149 (Sub-No. 2X)

WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY—DISCONTINUANCE OF SERVICE EXEMPTION—IN STANLY COUNTY, NC

Decided: August 8, 2006

In an amended petition filed on April 25, 2006, Norfolk Southern Railway Company (NSR), Yadkin Railroad Company (YRC), a wholly owned NSR subsidiary, and Winston-Salem Southbound Railway Company (WSSB), a Class III switching carrier owned equally by NSR and CSX Transportation, Inc. (CSXT), jointly seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to discontinue the following services. NSR seeks to discontinue service over 11.11 miles of rail line (the Line) between milepost WF-0.00 at Halls Ferry Junction and milepost WF-11.11 at Badin in Stanly County, NC, which it operates under lease from YRC. YRC wants to discontinue service over the Line, which it leases from Alcoa, Inc. (Alcoa), the owner of the Line's right-of-way, track, and improvements. WSSB wishes to discontinue service over the 5.21-mile portion of the Line between milepost WF-5.90 at Whitney, NC, and milepost WF-11.11 at Badin, which it and YRC jointly lease from Alcoa.

Notice of the filing was served and published in the Federal Register on May 15, 2006 (71 FR 28078). Alcoa, the Line's only shipper, timely filed a reply and protest in opposition on June 5, 2006.[1] The exemptions will be granted, subject to an environmental condition and standard employee protective conditions.

[1] One other shipper, Yadkin Brick Company (Yadkin Brick), has used the Line. According to petitioners, Yadkin Brick was located on the Halls Ferry Junction-Whitney segment in the mid to late 1990s and perhaps for some time earlier.

BACKGROUND

The Line was constructed by Tallassee Power Company (Tallassee), an Alcoa predecessor. In March 1916, shortly after construction was completed, Tallassee leased the 5.90-mile segment of the Line between Halls Ferry Junction and Whitney to YRC and the 5.21-mile segment between Whitney and Badin jointly to YRC and WSSB. The leases have no fixed term. They require the lessees to operate and maintain (except for extraordinary maintenance and capital improvements) the Line as common carriers providing motive power and equipment as needed to serve Alcoa's aluminum smelting facility at Badin and local traffic. The leases may be terminated without cause by the parties on 60 days' notice.

NSR is the only carrier that has conducted operations over the Line since 1996.[2] In that year, NSR entered into a haulage agreement to move cars for CSXT over the Whitney-Badin segment. That replaced the switching service WSSB had been providing for CSXT.

Alcoa's smelter operations at Badin have produced primary aluminum since 1916. Thousands of tons of alumina, aluminum fluoride, and other raw materials used to produce aluminum or the anodes essential to the smelters' electrolytic process were shipped to the Badin plant by rail weekly.

According to petitioners, the traffic moving over the 11.11-mile Line and the 5.21-mile Whitney-Badin segment has declined by more than 90% since 2001, the year after Alcoa cut production to 75% of capacity. Primary aluminum smelting operations at Badin ceased altogether in 2002 and the production of the anodes ceased in 2004. Petitioners claim that traffic volume to and from Badin declined in 2005 to 217 carloads (88 carloads on the Line and 129 carloads on the Whitney-Badin segment). The base year (Oct. 1, 2004 –Sept. 30, 2005) traffic volume was 285 carloads (112 carloads on the Line and 173 carloads on the Whitney-Badin segment).

---

[2] YRC ceased operations over the Line in 1951 when its property was leased to the Carolina and Northwestern Railway Company (CNR), a subsidiary of Southern Railway Company (SOR). Carolina & Northwestern Railway Company, Control, Etc., 282 I.C.C. 802 (1951). In 1988, CNR was merged into SOR, which became successor lessee of YRC's properties. Southern Railway Company—Merger Exemption—Carolina and Northwestern Railway Company, Finance Docket No. 31255 (ICC served May 12, 1988). SOR became NSR in 1990, and in 2000 NSR renewed its lease of, and authority to operate, YRC's properties. Norfolk Southern Railway Company—Corporate Family Transaction Exemption—Yadkin Railroad Company, STB Finance Docket No. 33951 (STB served Dec. 12, 2000).

In petitioners' view, it is unlikely, and speculative at best, that Alcoa will resume smelting operations at Badin, much less continue its current production of specialty products. They claim that the Badin plant is one of Alcoa's smallest, oldest, and most expensive to operate. Petitioners assert that Alcoa has made no definitive statements about resuming smelting operations in the last 4 years but has expanded existing, and built new, facilities elsewhere in the United States and abroad. Observing that Alcoa owns the Line and is not a rail carrier, petitioners state that, post discontinuance, the Line would revert to Alcoa as a private line. Petitioners further contend that "Alcoa can rehabilitate it, find another operator for it, sell it to a short line rail carrier or holding company or informally and privately railbank it if it believes it may have a need . . . for continued or expanded service . . . ." Petition at 31.

Petitioners have submitted verified statements and detailed work papers showing that NSR's operation of the Line at the base year traffic volume of 112 carloads will result in a forecast year (Mar. 2006 – Feb. 2007) avoidable operating loss of $372,091 and, with $516,602 of rehabilitation to bring the Halls Ferry Junction-Whitney segment up to Federal Railroad Administration (FRA) Class 1 safety standards, a total avoidable loss of $888,693. Petitioners' forecast year projection for WSSB to operate the Whitney-Badin segment (which does not need immediate rehabilitation) at the base year traffic volume of 285 carloads of switch traffic shows a total avoidable loss of $238,991.

Petitioners have also submitted the names of a number of motor carriers specializing in flatbed and heavy haul operations that are available to provide direct through service or rail-motor transload service at Charlotte, Greensboro, High Point and Winston-Salem, NC. They also note that Badin is located about 50 miles from Charlotte and 60-65 miles from Greensboro, High Point, and Winston-Salem, and that Badin is served by a state route that leads to U.S. highways and then to U.S. interstates. Additionally, petitioners state that Alcoa has trucked, and continues to truck, aluminum ingots from Badin, and that it trucks significant amounts of billets and ingots at another location. Finally, petitioners assert that Badin, with a population of 1,154, is the only community that would lose rail service as a result of the proposed discontinuances.

Petitioners argue that they have clearly demonstrated that continued maintenance, rehabilitation, and operation of the entire Line and the Whitney-Badin segment are burdens on interstate commerce. They further assert that the record demonstrates that continued service would impose a burden on them that outweighs the harm to Alcoa and, conversely, that discontinuance would result in no adverse impacts on the shipping public or on rural and community development.

Alcoa responds that, to grant the proposed discontinuance exemptions, the Board would have to interpret controversial terms of the leases ("ordinary" and "extraordinary" maintenance) and/or reform or void the leases' termination provisions. Citing Delaware & H. R. Corp. Trackage Agreement Modification, 290 I.C.C. 103 (1953) (Delaware), protestant argues that this agency does not have the requisite jurisdiction to void, reform, or interpret leases such as these, which predate the Transportation Act of 1940 and remain in effect without change. Moreover, Alcoa contends that it would be contrary to the longstanding policy of the Board and its predecessor, the Interstate Commerce Commission (ICC), to interpret or enforce private contracts.

According to Alcoa, aluminum smelting operations require rail service. Protestant characterizes the cessation of smelting operations at Badin as a "curtailment" and insists that such operations may resume when global economic conditions permit. It notes that the Badin plant is being maintained to permit the resumption of smelting operations.

Even without ongoing smelting operations, however, Alcoa insists that the Badin plant requires rail service and that it currently plans to continue shipping over the Line. Protestant states that the Badin plant is its only facility that produces high purity aluminum used in this country and abroad in high tech, defense, and aerospace applications. Alcoa assertedly needs rail service to move heavy loads of bulk material from smelters in Canada and northern New York to Badin and to transport some finished product outbound. Alcoa claims that truck service is far more costly and less reliable than rail, and it adds that transloading between truck and rail would cost about $400,000 annually.

Alcoa argues that petitioners have miscalculated the cost of operating the Line. Using unadjusted Uniform Rail Costing System (URCS) costs, protestant claims that NSR is realizing an average revenue-to-variable cost (RVC) ratio of 167% on traffic moving over the Line and 128% on traffic moving over the Whitney-Badin segment. Asserting that the RVC ratio for the Line is well above the 135% average RVC ratio computed by the Board for all traffic that moved in 2004 (the most recent year for which such data are available), Alcoa contends that the Line is operating profitably. O'Connor V.S. at 8.

In Alcoa's view, petitioners' avoidable cost analysis is seriously flawed. According to protestant, on-branch, off-branch, and maintenance costs have been overstated, while administrative costs have been understated. Protestant further asserts that extensive rail service is being provided for other customers by NSR crews located at Badin, but that the related revenues have not been recognized.

Alcoa also asserts that petitioners are improperly relying on past due maintenance to support their claim that the Line will operate at a significant avoidable loss. In Alcoa's view, petitioners are contractually obligated to perform ordinary maintenance and have not performed such maintenance on the Halls Ferry Junction-Whitney segment since 1989 and on the Whitney-Badin segment since 1983. Protestant argues that petitioners' failure to perform maintenance in accordance with the terms of the leases resulted in their creating a "windfall" for themselves and has led to the need for significant and more expensive rehabilitation now.

Accepting petitioners' past due maintenance as an avoidable cost, Alcoa contends, would reward them for their failure to maintain the Line as required under their contractual obligations. Indeed, Alcoa accuses petitioners of abusing the Board's exemption process by seeking to use this agency to create a defense to any Alcoa effort to enforce lease terms requiring YRC and WSSB to maintain the Line to permit "safe and convenient operation." Protestant further claims that petitioners could have terminated the leases under the contract terms, but have not done so in order to forestall a breach of contract action for their failure to maintain the Line as required by the leases.

Moreover, protestant contends that petitioners' avoidable loss claims should be ignored because petitioners either agreed to the applicable rates or can change them without regulatory interference. Specifically, Alcoa claims that most Badin traffic has moved, and continues to move, under contract rates. According to Alcoa, petitioners may renegotiate those contracts when they expire and at any time may raise tariff rates for non-contract movements. In this regard, Alcoa states that its consultant, Snavely King Majoros O'Connor & Lee, Inc., analyzed the data for many shipments similar to those that move to and from Badin over similar distances using the Board's Carload Waybill Sample and concluded that there was "potential for rate increases." O'Connor V.S. at 10.

In sum, Alcoa argues that, for all of the above reasons, this case is neither suitable for discontinuance of service or Board action pursuant to an exemption. As such, protestant requests that the petition be denied without prejudice to petitioners being allowed to file a formal discontinuance application.

DISCUSSION AND CONCLUSIONS

Jurisdiction. Alcoa's reliance on Delaware to support its contention that we do not have jurisdiction to grant the proposed discontinuance exemptions is misplaced. In Delaware, the applicant sought an adverse discontinuance of trackage rights. The ICC determined that the applicant was not interested in discontinuance but was seeking new terms of compensation in the form of a conditional grant of discontinuance authority. Relying on Thompson v. Texas Mexican Ry. Co., 328 U.S. 134 (1946), the ICC concluded that it had no jurisdiction to void or modify, directly or indirectly, through a grant of discontinuance authority, the terms of the parties' trackage rights agreement—an agreement which had not been approved by the ICC because it had preceded the Transportation Act of 1940.

Contrary to Alcoa's claims, our granting the proposed discontinuance exemptions, if warranted, would not affect the substantive terms of the leases at issue or the parties' respective rights and obligations thereunder. Here, we determine whether petitioners have satisfied the statutory criteria for grants of discontinuance authority pursuant to exemption. No contract interpretation will be necessary. Even if we were to grant the discontinuances, the subject leases would remain in effect undisturbed. The discontinuance exemptions, which are permissive, would not affect any breach of contract action Alcoa brought for petitioners' alleged failure to maintain the Line.[3]

---

[3] On August 1, 2006, Alcoa filed in the Stanly County Superior Court of North Carolina a complaint against the petitioners here involving leases at issue in this proceeding and environmental issues addressed in comments to this proceeding. Alcoa,
(Continued...)

Similarly, a grant of the exemptions would not be contrary to Board policy against interfering with private contracts.

The exemptions. Under 49 U.S.C. 10903, a rail carrier may not discontinue operations without the Board's prior approval. Alcoa has argued that we should require petitioners to file a formal application. We disagree. The record compiled in these proceedings is extensive. Under 49 U.S.C. 10502, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. The record before us supports those findings here.

Alcoa argues that the Line is operating profitably based on the analysis Mr. O'Connor performed using unadjusted URCS costs. Because Mr. O'Connor's conclusions are not accompanied by any quantitative support or methodology, we can neither verify them nor find them credible. Nor do we find merit to Alcoa's contention that petitioners' claims of avoidable losses should be ignored because they either agreed to the applicable rates or can change them without regulatory interference. Alcoa has not offered to renegotiate the contract rates. Notwithstanding Mr. O'Connor's finding that there is potential for rate increases, there is no quantitative evidence to suggest that revenues could be raised to the extent necessary to profitably operate either the Line or the Whitney-Badin segment.

Alcoa's contention, that petitioners' avoidable cost analysis is flawed, is not adequately supported. Protestant has not presented any quantitative evidence challenging petitioners' on-branch and off-branch revenues and costs. Based on our review, it appears that petitioners' development of these revenues and costs fully complies with our rules at 49 CFR 1152.31(a) and 1152.32(n). Nor do we find credible Alcoa's contention that petitioners' analysis includes off-branch costs for services provided for other customers. While Alcoa correctly observes that off-branch revenues and related costs may not be included in an avoidable cost analysis, the evidence it has presented is basically anecdotal and lacks quantitative support. Additionally, we find no merit to protestant's contention that petitioners' analysis fails to recognize the costs saved by two installations—an office building and a locomotive storage site—that Alcoa provides them without charge. Petitioners' cost analysis does not claim administrative expenses associated with these facilities.

Petitioners appear, however, to have overstated normalized maintenance costs. They projected $207,977 in forecast year normalized maintenance for the Line. That figure is based on $92,475 ($15,673 per mile) of normalized maintenance for the 5.9-mile Halls Ferry Junction-Whitney segment and $115,502 ($22,169 per mile) of normalized

---

(…continued)
Inc. v. Norfolk Southern Railway Company, Inc., Yadkin Railroad Company, and Winston-Salem Southbound Railway Company, Civil Action No. 06-CVS-1187.

maintenance for the 5.2-mile Whitney-Badin segment. Normalized maintenance costs usually do not exceed $5,000 per mile annually.

Petitioners' normalized maintenance costs consist of two components—routine and program work. Routine maintenance, which includes inspections, general track repair, ditching, brush cutting, rail testing, vegetation control, signal test/repair, and bridge repairs, is estimated by petitioners to cost $4,102 per track mile for the Halls Ferry Junction-Whitney segment and $3,900 per track mile for the Whitney-Badin segment. Program maintenance, which includes such items as timber and surfacing, rail renewal, and bridge renewal, are estimated to cost $11,572 per track mile for the Halls Ferry Junction-Whitney segment and $18,269 per track mile for the Whitney-Badin segment.

Program maintenance items are customarily included in rehabilitation, not in maintenance, estimates. If program maintenance is removed, petitioners' maintenance costs would be reduced by $163,458 for the Line and $95,183 for the Whitney-Badin segment, resulting in maintenance costs of $44,521 and $20,320, respectively. As a result, NSR's forecast year avoidable operating loss would decline to $206,008 for the Line, and WSSB's forecast year avoidable operating loss would decline to $142,858 for the Whitney-Badin segment.

While Alcoa challenges petitioners' right to claim rehabilitation, it did not submit quantitative evidence to refute petitioners' $516,602 rehabilitation estimate. Petitioners' rehabilitation estimate appears reasonable but may be overstated to the extent it includes a 37-man gang to perform tie replacement and surfacing. Such a gang ordinarily is used on high density main lines where speed in replacing the timber and surface of the line is of paramount importance. If all labor and labor related costs connected to the use of the specialized gang were removed, NSR's cost to rehabilitate the Halls Ferry Junction-Badin segment would decline by as much as $85,000 to $431,602, and NSR's total avoidable loss to operate the Line would decline by as much as $251,083 to $637,610.

Our restatement of petitioners' avoidable costs shows that NSR's operation of the Line will result in a total forecast year avoidable loss of $206,008 if rehabilitation is not considered and $637,610 if rehabilitation without all costs related to the 37-man gang is considered. Accordingly, there is no need to decide whether petitioners' rehabilitation cost should or should not be considered an avoidable cost in the context of this case. The Line will operate at a significant forecast year avoidable loss regardless of whether rehabilitation is considered, and the Whitney-Badin segment will operate at a significant forecast year avoidable loss even with no immediate need for rehabilitation.

Protestant does not question that transportation alternatives are available and acknowledges the use of motor carrier service for outbound movements. Rather, Alcoa argues that the alternatives will result in significantly higher shipping costs for critical commodities. Alcoa's $400,000 cost estimate for transload service, however, is totally unsubstantiated. Moreover, the fact that a shipper is likely to suffer some harm and added expense is insufficient by itself to outweigh the detriment to the public interest caused by continued operation of uneconomic facilities, especially where transportation alternatives are available. See, e.g., Chicago and North Western Transp. Co.—Abandonment, 354 I.C.C. 1, 7 (1977).

In these circumstances, detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions, and encourage efficient management by relieving petitioners of the costs of maintaining and operating a line which has experienced significantly decreased traffic levels in recent years. [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation is not necessary to protect shippers from the abuse of market power. Alcoa, the owner of, and the only shipper on, the Line may arrange with others to serve its Badin plant and has other transportation alternatives available as well. Given the finding regarding market power, it is not necessary to determine whether the proposed discontinuance is limited in scope.

In approving these discontinuance exemptions, we must ensure that affected rail employees will be adequately protected. 49 U.S.C. 10903(b)(2). We have found that the conditions imposed in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979) (Oregon), satisfy the statutory requirements, and we will impose those conditions here.

The Board has considered the environmental and energy impacts associated with the proposed discontinuances. Petitioners have submitted an environmental report with their petitions for exemption and have notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed discontinuances. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on June 12, 2006, in which it recommended that no environmental conditions be imposed here. SEA also requested comments.

On July 12, 2006, Alcoa submitted information indicating potential hazardous waste contamination by petitioners within the rights-of-way (ROW). As part of its submission, Alcoa also provided color photographs which show staining and standing pools, of what appears to be petroleum, on the ballast materials in an area near its Badin, NC facility. Furthermore, Alcoa states that petitioners are responsible for a continuing series of petroleum releases that, in many cases, may never have been properly remediated.

On July 18, 2006, petitioners submitted information contesting Alcoa's position.[4] In their reply, petitioners state that Alcoa has misstated the facts and mischaracterized the problem, if any, relating to the extent of any petroleum leakage. Furthermore, they argue that Alcoa has not provided any information where prior petroleum releases may have occurred and where petitioners have failed to act responsibly to remediate the site. Thus, petitioners argue that the indication of potential continuing releases is speculative.

In order to address the concerns raised by Alcoa, SEA recommends that a condition be imposed requiring petitioners to consult with the North Carolina Department of Environment and Natural Resources, Morresville Regional Office, Aquifer Protection Section (Mr. Andrew Pitner, Environmental Regional Supervisor at 704-663-1699) regarding potential contamination within the ROW. The new recommended condition is: Petitioners shall consult with the North Carolina Department of Environment and Natural Resources, Morresville Regional Office, Aquifer Protection Section (Mr. Andrew Pitner, Environmental Regional Supervisor at 704-663-1699) prior to consummation regarding potential contamination of the ROW and, if appropriate, shall comply with all reasonable requirements. Petitioners shall report the results of this consultation to SEA and Alcoa.

We will impose the environmental condition recommended by SEA. As so conditioned, we conclude that the proposed discontinuances of service will not significantly affect either the quality of the human environment or the conservation of energy resources.

Because these proceedings involve discontinuances of service, and not abandonments, the Board does not consider offers of financial assistance (OFAs) to acquire the Line for continued rail service (the OFA provisions for a subsidy to provide continued rail service do apply to discontinuances of service), trail use requests, or requests to negotiate for public use of the line.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the discontinuances of service by petitioners as described above, subject to: (1) the employee protective conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979); and (2) the condition that petitioners shall consult with the North Carolina Department of Environment and Natural Resources, Morresville Regional Office, Aquifer Protection Section (Mr. Andrew Pitner, Environmental Regional Supervisor, 704-663-1699) prior to consummation regarding potential contamination of the rights-of-way and, if appropriate, shall comply with all reasonable requirements. Petitioners shall report the results of this consultation to SEA and Alcoa.

---

[4] SEA notes that the reply submitted by NS was filed on July 18, 2006, and that a subsequent Alcoa reply to the NS reply was filed on July 20, 2006. The public comment period ended on July 12, 2006.

2. An OFA under 49 CFR 1152.27(b)(2) to subsidize continued rail service must be received by the railroads and the Board by August 21, 2006, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a $1,300 filing fee. See 49 CFR 1002.2(f)(25).

3. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

4. Petitions to stay must be filed by August 28, 2006. Petitions to reopen must be filed by September 5, 2006.

5. Provided no OFA to subsidize continued rail service has been received, this decision will be effective on September 10, 2006.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary